IJM CORPORATION BHD

v.

HARTA KUMPULAN SDN BHD (NO 2)

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY J
[CIVIL APPEAL NO: MT1-22-724-2005]
29 NOVEMBER 2007

CIVIL PROCEDURE: *Contempt of court - Order of committal, application for - Whether there was breach of permanent injunction granted by court - Contents of letter written by defendant to plaintiff's managing director - Whether related to defendant's rights as shareholder - Whether defendant wrote to plaintiff's managing director in a personal capacity - Whether defendant intended to perpetuate the very nuisance it had been prohibited from inflicting - Whether injunction restraining defendant from communicating with plaintiff clear and unambiguous - Whether defendant deliberately attempted to circumvent injunction - Whether defendant guilty of contempt of court - Whether proper that a custodial sentence be imposed*

This was the plaintiff's application by way of motion for a committal order against the defendant's directors for breach of the permanent injunction granted by the court. On 18 January 2007, the court granted summary judgment in favour of the plaintiff in this action. The judgment included, *inter alia*, a permanent injunction by which the defendant was restrained either by itself or by its employees or agents or any other person from contacting the plaintiff either through letters and/or whatever announcement and/or any publication regarding any matter related to the Joint Development Agreement ('JDA') that may constitute a nuisance on the plaintiff. The judgment was duly endorsed with a penal notice as required by O. 45 r. 7 of the Rules of the High Court 1980. A sealed copy of the judgment was duly served on the defendant at its registered office. The plaintiff filed this motion for an order of committal against the three directors of the defendant namely Wong Quai Yin, Yai Yen Hon @ Chua Yen Hon and Yai Heng Yew @ Chua Heng Yew as the defendant had committed several breaches of the injunction. The plaintiff specifically referred to several letters written by the defendant to the plaintiff's managing director, one Dato Krishnan Tan which they contended amounted to a serious breach of the injunction order. The letters consisted of matters arising between the plaintiff and the defendant under

A the JDA. The plaintiff contended that it established the defendant's intention of communicating with the plaintiff through its managing director which invariably offended the injunctive order. According to the plaintiff, regardless of fair warning and in open defiance the plaintiff submitted that the defendant still
B persisted in writing to the plaintiff's managing director. The defendant in resisting the plaintiff's applications advanced the following contentions: (i) the plaintiff in citing Yai Heng Yew @ Chua Heng Yew as one of the directors of the defendants had acted in bad faith as he had, long before the application for leave,
C resigned as a director as evidenced by the filing of Form 49 with the Companies Commission Malaysia; (ii) the letters were written to Dato' Tan in his personal capacity and not in his capacity as the plaintiff's managing director; (iii) the letters were written to Dato Tan in his capacity as a qualified accountant and not in his
D capacity as the plaintiff's managing director; (iv) the defendant was writing these letters in its capacity as a shareholder of the plaintiff and (v) the injunction only restrained the defendant from writing to the plaintiff, not the plaintiff's agents, officers or employees.

E **Held:**

(1) There was no basis to conclude that the citation of Yai Hen Yew @ Chua Heng Yew who had resigned as a director prior to the leave application tantamount to an act of bad faith on
F the part of the plaintiff. The said resignation was not reflected in the commission's record which according to the plaintiff's search conducted on 23 April 2007 still lists Yai Heng Yew @ Chua Heng Yew as a director of the defendant through the last document filed with the commission on 13 February
G 2007. Though it was not disputed that the defendant had filed in Form 49 pertaining to the said resignation, the document prepared by the defendant was an internal document and the plaintiff as an outsider had no access to it. As an outsider the plaintiff could only rely on the information furnished by the
H commission and hence was entitled to assume that the information the commission supplied upon payment of the prescribed fee was accurate. The plaintiff could not be faulted and was justified to believe that Yai Hen Yew @ Chua Heng Hew was still a director when the leave application was made.
I It could hardly be said that the plaintiff's conduct in citing Yai Heng Yew @ Chua Heng Yew was evidence of bad faith that tainted the motion for committal against the other two directors. (paras 10, 11, 16 & 17)

(2) The contents of the letters the defendant had written, whether addressed to its former solicitors and copied to the plaintiff's managing director or written to the latter directly, only relate to matters in dispute between the plaintiff and defendant arising out of the JDA. When the defendant expressly stated in its letters to the plaintiff's managing director that it was writing to him in his personal capacity, the defendant was merely attempting to circumvent the injunction using those words as a caveat. The defendant was not a personal acquaintance of the plaintiff's managing director. This negated any possibility that the letters were written to the plaintiff's managing director in his personal capacity. The contents of the letter also did not have anything to do with him in his personal capacity. Further, the letters were also not written to the plaintiff's managing director in his capacity as a qualified accountant because once again the contents of the letter had nothing to do with him in that capacity. (para 48)

(3) Nothing in the letters sent to the plaintiff's managing director was related to the defendant's rights as a shareholder. A shareholder can only raise matters that concern his or her shares in the company. In the present case, the defendant was not writing about matters that affected its shareholding in the plaintiff. Instead, the defendant was writing about matters completely alien to its shares in the plaintiff. These matters were relevant to the defendant only in its capacity as one of the parties to the JDA and not as the plaintiff's shareholder. The contents of the letters clearly had nothing to do with the defendant's position as a shareholder of the plaintiff. (paras 30 & 48)

(4) Evidence showed that the defendant intended to perpetuate its past nuisance against the plaintiff and did so by addressing its letters to the plaintiff's managing director instead of the plaintiff. The scope of the injunction was clear. An injunction restraining the defendant from committing nuisance by communicating with the plaintiff by necessity included communicating with any agent, officer or employee of the plaintiff given that the plaintiff was an artificial legal entity and any communication with the plaintiff before or after the injunction was granted could only be through the medium of the plaintiff's agents, officers or employees. In writing the impugned letters, the defendant had deliberately attempted to

circumvent the injunction and perpetuate the very nuisance it had been prohibited from inflicting on the plaintiff. The defendant was thus guilty of contempt of the court. (paras 48, 51, 58)

(5) This was a case of downright defiance of the injunction arising from the defendant's obvious and deliberate attempt to circumvent the injunction mentioned. The defendant had not shown any remorse and had not offered any apology for its conduct. The defendant was both obstinate and intractable despite the weight of the overwhelming evidence against it. There was no evidence to demonstrate that the defendant was contrite and sorry for its flagrant breach of the injunction. Hence in the light of the defendant's conduct and the gravity of the breach, it was only proper that a custodial sentence be imposed. (paras 65 & 66)

(6) The defendant was found guilty of contempt. Accordingly, the defendant's director Yai Yen Hon @ Chua Yen Hon who authored and sent the letters to the plaintiff's managing directors in breach of the injunction stand committed to prison to be imprisoned for a period of 14 days for the contempt of court. Wong Quai Yen to be fined in the sum of RM20,000 to be paid for forthwith and in default thereof to a term of imprisonment of 14 days for the contempt committed by the defendant. (para 77)

Case(s) referred to:

Antony Ratos Domingos Ratos v. City Specialist Centre Sdn Bhd (t/a City Medical Centre) (Attorney General, Intervener) [1996] 3 CLJ 415 HC ***(refd)***

Attorney General for Tuvalu v. Philatelic Distribution Corp Ltd [1990] 1 WLR 926 ***(refd)***

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor [1978] 1 MLJ 345 ***(refd)***

Derby & Co Ltd and Ors v. Weldon and Ors (No 10) [1991] 2 All ER 908 ***(refd)***

Director General of Fair Trading v. Buckland [1990] 1 All ER 545 ***(refd)***

Garden Cottage Foods Ltd v. Milk Marketing Board [1984] 1 AC 130 ***(refd)***

Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals [1995] 4 CLJ 427 SC ***(refd)***

Howitt Transport Ltd & Anor v. Transport and General Workers' Union National Industrial Relations Court [1973] 1 CR 1 ***(refd)***

Lennard's Carrying Company v. Asiatic Petroleum Co Ltd [1915] AC 705 ***(refd)***

Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***

Nicolas Pappadis v. Chan Shing Sheung Barry [1989] 2 HKLR 511 ***(refd)***
Re Bramblevale Ltd [1970] Ch 128 ***(refd)***
Re Galvanized Tank Manufacturers' Association's Agreement [1965] 1 WLR 1074 ***(refd)***
Rex v. Dolan [1907] 2 IR 260 ***(refd)***
United States v. Milwaukee Refrigerator Transit Co 142 Fed 247 [1905] ***(refd)***
Seafood Court Estates Ltd v. Asher [1949] 2 KB 481 ***(refd)***
See Teow Chuan & Anor. v. Dato' Anthony See Teow Guan [2006] 2 CLJ 292 CA ***(refd)***
Syarikat M Mohamed v. Mahindapal Singh & Ors [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16 HC ***(refd)***
TO Thomas v. Asia Fishing Industry Pte Ltd [1977] 1 LNS 126 ***(refd)***
William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor [1994] 3 CLJ 125 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 126
Rules of the High Court 1980, O. 45 rr. 5(1)(b)(ii), 7(3)(a), O. 52 r. 2(2)

For the plaintiff - Dr Clarence Edwin; M/s Zaid Ibrahim & Co
For the defendants - Mr Naidu; M/s JJ Naidu & Rakan-rakan

Reported by Suhainah Wahiduddin

JUDGMENT

Syed Ahmad Helmy J:

[1] Enclosure 62 is the plaintiff's application by way of motion for a committal order against the defendant's directors for breach of the permanent injunction granted by this Honorable Court on 18 January 2007.

[2] The motion dated 8 May 2007 is supported by the statement in encl. 50 and the affidavit affirmed by Tham Huen Cheong verifying the facts in support of the motion in encl. 51 and hence the procedural requirement as laid down in O. 52 r. 2 of the Rules of the High Court 1980 have been duly complied.

[3] The several breaches of the injunction have been set out in the statement filed pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980. There are four supporting affidavits filed by the plaintiff and three opposing affidavits of the defendant and they are as follows:

– The affidavit of Tham Huen Cheong affirmed on 27 April 2007 verifying the facts in support of the application for a committal order;

– The affidavit in reply of Yai Yen Hon @ Chua Yen Hon affirmed on 8 June 2007, filed on behalf of the deponent and Wong Quai Yin, both being the defendant's directors;

– The plaintiff's affidavit in reply affirmed by Tham Huen Cheong on 13 June 2007;

– The affidavit in reply of Yai Yen Hon @ Chua Yen Hon affirmed on 20 June 2007;

– The affidavit in reply (2) affirmed by Tham Huen Cheong on 22 June 2007;

– The affidavit in reply of Yai Yen Hon @ Chua Yen Hon affirmed on 2 July 2007; and

– The plaintiff's affidavit in reply (3) affirmed by Tham Huen Cheong on 5 July 2007.

[4] As is evident from the pleadings herein part of the plaintiff's claim in this action was for nuisance, which the plaintiff contended arose from the constant letters the defendant had been sending the plaintiff repeating *ad nauseam* matters in dispute between the plaintiff and defendant.

[5] On 18 January 2007, this Honorable Court granted summary judgment in favour of the plaintiff in this action. The judgment included, *inter alia*, a permanent injunction by which the defendant was restrained either by itself or by its employees or agents or any other person from contacting the plaintiff either through letters and/or whatever announcement and/or any publication regarding any matter related to the Joint Development Agreement dated 30 March 1992 that may constitute a nuisance on the plaintiff. The judgment was duly endorsed with a penal notice as required by O. 45 r. 7 of the Rules of the High Court 1980.

[6] A sealed copy of the judgment was duly served on the defendant at its registered office. A sealed copy was also extended to the defendant's then solicitors, Messrs. Tam Cheng Yau & Co.

[7] Leave to file in this motion was granted by this court on 8 May 2007 whereupon the plaintiff filed this motion for an order of committal against the three directors of the defendant namely Wong Quai Yin, Yai Yen Hon @ Chua Yen Hon and Yai Heng Yew @ Chua Heng Yew as the defendant has committed several breaches of the injunction, the particulars of which are set out hereunder.

[8] The plaintiff's counsel in their written submission specifically referred to the several letters written by the defendant to the Plaintiff's Managing Director Dato' Krishnan Tan which they contend amounted to a serious breach of the injunction order. The several letters and the relevant paragraphs which amounted to a breach of the injunction order is reproduced.

1. The letter dated 19 March 2007, which the defendant wrote to its former solicitors. The letter was copied to Dato' Krishnan Tan, the plaintiff's managing director. It is the plaintiff's contention that the breach of the injunction appears in what was written to the plaintiff's managing director and in particular to the paragraph whereby the defendant stated:

> If your company does make payment to our claim as per writ of summons No. MT2-22-58 year 2007 ordered by the Appeal Court on 21/11/2006, please make a cheque for the amount claimed in favour of our name to comply to the exact terms of the borang 14A used for the said transfer and send it to our solicitors Tam Cheng Yau & Co. as stakeholders of the cheque to protect their interest ... all we wish is that the matters of transfer and registration of our properties on 22/12/2005 between your company and our company can be settled amicably without any interference or obstruction (if applicable) from others.

2. The letter dated 23 March 2007 written by the defendant to its former solicitors which was again copied to the plaintiff's managing director Dato' Krishnan Tan and the offending paragraph relied upon by the plaintiff is the paragraph which reads as follows:

> This information is supplied to you in your personal capacity as the (sic) one of the signatories to all the 5 borang 14A of the NLC and we in our capacity as a shareholder of IJM.

3. Four days later on 27 March 2007, the defendant wrote a letter directly to the plaintiff's managing director which the plaintiff contends was the single most conclusive evidence of breach by the defendant. The entire letter consisting of 47 paragraphs for the most part speaks of matters arising between the plaintiff and defendant under the JDA and in support of their contention of conclusive evidence of breach by the defendant the plaintiff specifically referred to the paras 2, 4, 5, 16, 17, 20, 25, 26, 27, 32, 35, 36, 37 and 40(i) thereof which reads:

> 2. The matter of MT2-22-58 year 2007 is outside the "Gag order" as it involves only the acquisition of our 5 properties by IJM based solely on borang 14A of the NLC and therefore the "Gag order" dated 23/3/2006 does not apply to us.
>
> 4. After going through three solicitors, we have come to realize that we have to depend on ourself (sic) more than the advices of solicitors or tax consultants.
>
> 5. We believe your company, IJM, is in the same situation like us by relying too much on our *(sic)* legal or account advisors.
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> 16. Our present desire is to settle with your company all matters brought upon us by your solicitors beyond our control and in full compliance with the Laws of Malaysia.
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> 17. The defective writ of summons filed against your company has been withdrawn ... If we had adhered to such defective summons filed by our solicitors, both of us will be in trouble in that the suits will definitely be prolonged.
>
> 20. If you or IJM is desirous of negotiating with us direct, we are pleased to do so provided the initiative is from your company, IJM, as the "Gag order" on our civil suit S3-22-683-2006 on us is still effective.
>
> 25. If any negotiation with us is agreed by you after your company payment direct to us for the amount claimed in suit No. MT2-22-58 year 2007, we would like to negotiate with you and your company in the absence of solicitors for all remaining claims against your company. The solicitors will come in only after our mutual agreement and settlement.

26. It is our firm belief that the Gag order imposed on us to prohibit us to communicate direct with your company after Zaid Ibrahim & Co. had successfully obtained a High Court Order dated 1/2/2005 to compel us to transfer our 5 properties to your company is totally not necessary. Please tell us what "nuisance" can we cause to your company by giving the correct advice and interpretation of the Income Tax provisions to you to avoid infringement of the ITA? Is it a nuisance to advise or teach your company the practical application of the Income Tax Law and Account? ... We should get a medal for such advice from the Ministry of Finance.

27. We do not see the purpose of the "Gag order" other than (we believe) for compelling IJM to acquire our 5 properties with payment by mistake which is not IJM's original aim and intention as evident from IJM's directors' resolution to accept the transfer of our 5 properties without authorising payment.

32. Money must change hand from the transferee to the transferor of the 5 properties before registration *via* borang 14A of the NLC in which the total sum of RM2.84 million *(sic)* is expressly shown ...

35. ... The 5 properties **had been registered** in the name of IJM on 22/12/2005 by way of normal conveyancing of landed property *via* borang 14A of the NLC. In this case, we do not need a judgment debt from the Court for winding up action under the Companies Act.

36. The debt of RM2.84 million is an undisputed debt based on exactly the terms of the transfer instruction *(sic)* borang 14A of the NLC and therefore we are a creditor of IJM by assignment of the gazetted transfer instrument, borang 14A of the NLC and we are given the legal right to proceed with the winding up action under the Companies Act with effect from the date 22/12/2005. Even without a judgment from the Court because the debt caused by the mutually executed borang 14A is not disputed and therefore the transaction is not a triable issued to be decided by the Court ...

37. We have been advised that we have the right to proceed with winding up action based on the undisputed borang 14A of the NLC and therefore outside the existing injunctions which are based entirely on the Joint Development Agreement dated 30/3/1992 (JDA) and our

A earlier invoice dated 25/10/2005. The borang 14A for transfer is not within the terms of the injunction orders. The Court cannot impose injunction on Section 215 of the NLC read together with Section 340 from being operational as there is no dispute between the parties on this matter.

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40. If all our good intention to assist IJM to right the wrong is not accepted, we have no choice but to take winding up action based on the following grounds:

C (i) IJM is unable to pay its debt to its creditor by assignment of the borang 14A of the NLC on 22/12/2005.

4. The plaintiff's solicitors also in support of their contention of the breach of the injunctive order adverted to the defiant D attitude of the defendant in considering itself no longer bound by the injunctive order as expressed in their letter dated 29 March 2007 addressed to the plaintiff's solicitors the relevant portion of which reads:

E The permanent injunction order ... was grounded or based on affidavits and facts dated 31/5/2006, 22/8/2006 & 12/9/2006 which were before the Appeal Court Order and decision on 21/11/2006 and therefore **the permanent injunction has been superseded by the Appeal Court Order** and decision that money must change hand and the F triable issues based on the Joint Development Agreement dated 30/3/1992 (JDA) are academic as declared by the Appeal Court.

We consider the permanent injunction received by us in the afternoon on 28/3/2007 cannot be enforced after the date G 22/11/2005 as such injunction is against the NLC, the Appeal Court Order and direction and the Companies Act, in particular Section 218(2)(a) as we are a creditor by assignment of the borang 14A of the NLC **mutually executed by IJM & HKSB** as a normal landed property H transaction through normal conveyancing as evident from the documents of transfer obtained from the Land Office, Johor Bahru.

Please do not instruct any solicitor of yours to obtain a "Gag order" to prohibit us to communicate with you. Our I communication with you is to prevent others from forcing us to lodge a complaint or report against you to enable the appropriate authorities, agency or statutory body such as

the security commission to initiate investigation against you and IJM. Attached is a copy of our reply to your solicitors Zaid Ibrahim & Co on the matter of permanent injunction dated 18/1/2007.

3. We also note that the exparte injunction was granted upon the application of your solicitors based only on the written submission of Dr. Clarence Edwin and not supported by affidavit from your company or authorised person.

4. We do not know whether your company has given written consent to Zaid Ibrahim & Co to apply for the exparte injunction and "Gag order".

6. Please help us to help you and your company. The sum of RM2.84 million is not a big amount to your company and all other outstanding claims can be settled mutually without any obstruction or interference from or by others. (emphasis added)

5. The defendant thereafter sent a letter dated 4 April 2007 to its solicitors and copied this letter to the plaintiff's managing director. To the plaintiff's managing director, the defendant wrote:

Please contact our Mr. Yai Yen Hon if you require any assistance from us as a shareholder of IJM to protect the interest of IJM. You must not allow others to ruin IJM or other unwitting or innocent persons by obstruction to any enforcement of the Laws of Malaysia to the benefit of IJM as a public listed company for judgment debt under Order 14 in chamber which is better than judgment debt through Open Court trial. We have to keep you informed and not to catch you by surprise in future.

[9] The plaintiff in respect of the paragraph aforesaid contends that it establishes the defendant's intention of communicating with the plaintiff through its Managing Director which invariably offends the injunctive order.

[10] The plaintiff's solicitors in view of the offending letters aforesaid gave fair warning of their aggrievement as to the conduct of the defendant in persistently breaching the injunctive order and their intention to enforce the terms of the injunction through their letter of 5 April 2007 to the defendant's then solicitors on 5 April 2007 informing them that regardless of whatever opinion the

defendant may have concerning the order of this Honorable Court on 18 January 2007, the order must be obeyed until and unless it is set aside by an appellate court and the defendant was also put on notice, through its solicitors, that the plaintiff would seek enforcement of the injunction if the defendant breached it.

[11] Regardless of fair warning and in open defiance the plaintiff submits that the defendant still persisted in writing to the plaintiff's managing director as evidenced by the letters dated 12 April 2007, 13 April 2007, 16 April 2007 and 17 April 2007 to the plaintiff's managing director which the plaintiff avers breaches the injunction order.

[12] As regards the letter dated 12 April 2007 the plaintiff refers to the paragraph which reads:

> This is our last attempt to help IJM and others who had interest in this matter before and after all the suits have been initiated by IJM against us.

and in respect of the letter dated 13 April 2007 the paragraph where the defendant wrote, *inter alia*, "Please advise your board to stop IJM's agents from taking action to the detriment of IJM ...".

[13] The offending paragraph in the letter of 16 April 2007 reads:

> As a member of the Board of Directors, you must comply to Sections 364 & 364A of the Companies Act to protect IJM's shareholders in IJM's financial year ended 31/3/2007. We request your assistance in our capacity as one of the minority shareholder of IJM and NOT as plaintiff in our two suits ordered and or directed by the Court to be implemented. Any payment to us for judgment debt etc must be made by cheque and cross account payee in our favour and either send the cheque to M/s Tam Cheng You & Co. as stakeholder or direct to us to secure our official receipt. Your company is still liable to pay us in the event that we do not receive a judgment sum for whatever reasons if your company fails to do so.

[14] Finally, in the letter of 17 April 2007, the offending paragraph reads:

> ... Any valid application to set aside our said writ (if duly served on us) is asking the Court to sanction criminal activities and illegalities all pleaded in our said writ without an Open Court trial beside the contempt of Appeal Court Order pronounced on 21/

> 11/2006. Please note and be informed that your staff Mr Tham Huen Cheong has affirmed an affidavit in support of the setting aside application for our civil suit No. MT2-22-58 year 2007 ordered by the Appeal Court on 21/11/2007 (sic). (emphasis added)

[15] The plaintiff contends that the sum total of the statements made in the four letters aforesaid illustrates that the defendant was not writing to the plaintiff's managing director in his personal capacity. Mr. Tham, the deponent of all the affidavits in this suit, is the plaintiff's employee not the personal employee of the plaintiff's managing director. This demonstrates without doubt that the defendant was writing to Dato' Tan in his capacity as the plaintiff's managing director, and through him to the plaintiff, concerning matters in dispute between the plaintiff and defendant and arising out of the Joint Development Agreement dated 30 March 1992.

[16] The defendant in resisting the plaintiff's applications advanced the following contentions:

1. The plaintiff in citing Yai Heng Yew @ Chua Heng Yew as one of the directors of the defendants acted in bad faith as he had on 23 June 2006, long before the application for leave, resigned as a director as evidenced by the filing of Form 49 with the Companies Commission Malaysia on 17 July 2006.
2. The letters were written to Dato' Tan in his personal capacity and not in his capacity as the plaintiff's managing director.
3. The letters were written to Dato' Tan in his capacity as a qualified accountant and not in his capacity as the plaintiff's managing director.
4. The defendant was writing these letters in its capacity as a shareholder of the plaintiff.
5. The injunction only restrains the defendant from writing to the plaintiff, not the plaintiff's agents, officers or employees.

[17] On the issue of bad faith from the evidence deducible from the affidavits filed, I do not see any basis to conclude that the citation of Yai Hen Yew @ Chua Heng Yew who had resigned as a director prior to the leave application tantamounts to an act of bad faith on the part of the plaintiff. Though it cannot be disputed that the defendant had filed in Form 49 pertaining to the

A resignation on 17 July 2006 nevertheless the resignation was not reflected in the Commission's record which according to the plaintiff's search conducted on 23 April 2007 still lists Yai Heng Yew @ Chua Heng Yew as a director of the defendant through the last document filed with the Commission on 13 February
B 2007. The Form 49 is the document prepared by the defendant and being an internal document the plaintiff as an outsider has no access to it. An outsider the plaintiff can only rely on the information furnished by the Commission and hence is entitled to assume that the information the Commission supplies upon
C payment of the prescribed fee is accurate. In the premise to my mind the plaintiff cannot be faulted and was justified to believe that Yai Hen Yew @ Chua Heng Hew was still a director when the leave application was made. In any event the plaintiff has immediately upon being appraised of the current status of Yai Hen
D Hew @ Chua Heng Yew did not serve this motion on him nor attempted to pursue an order for committal against him. Hence given the circumstances aforesaid it can hardly be said that the plaintiff's conduct in citing Yai Heng Yew @ Chua Heng Yew was evidence of bad faith that taints the motion for committal against
E the other two directors.

[18] On the issue of whether the letters were written to Dato' Krishnan Tan in his personal capacity and not in his capacity as the plaintiff's managing director an examination of the several
F letters and in particular to the offending paragraphs as herein before referred to would provide an answer.

[19] In respect of the offending paragraph on the defendant's letter of 19 March 2007 it is patently clear and it is my finding
G that the defendant wrote to Dato' Krishnan Tan not because the defendant was personally acquainted with the latter but solely because he was the plaintiff's managing director. I have scrutinised the several affidavits filed by the defendant and find no evidence that established Dato' Krishnan Tan as a personal acquaintance
H of the defendant or for that matter its directors. On the contrary the plaintiff's affidavit expressly refutes any relationship between Dato' Krishnan Tan and the defendant. Furthermore the usage of the phraseology "your company" in the letter clearly refers to the plaintiff and the content thereof revolves around the dispute
I between the plaintiff and defendant on matters arising from the

Joint Development Agreement (JDA) – something which had nothing to do with the plaintiff's managing director in his personal capacity.

[20] In respect of the offending paragraph in the letter of 23 March 2007 though the plaintiff's managing director did execute the form the defendant mentioned. Nevertheless of particular importance is that he did not do so in his personal capacity but in his capacity as a director in the plaintiff's company. The consequences, if any, of his actions would to my mind implicate the plaintiff and him as a director of the plaintiff but certainly not in his personal capacity. Hence, it can be surmised that the defendant was not writing to the plaintiff's managing director in the latter's personal capacity. The defendant's expression that the letter was written to Dato' Tan in his personal capacity was simply a pretext of complying with the letter of the injunction while breaching its essence.

[21] To my mind an analysis of the phraseology used in the 14 paragraphs of the letter of 27 March 2007 as rightly contended by the plaintiff's can only lead to a singular conclusion namely the defendant was writing to the plaintiff's managing director for no reason other than the fact that he held that office in the plaintiff company and that everything written related directly to the matters in dispute between the plaintiff and defendant arising from the JDA. The defendants insistence in emphasising that the phraseology used in the offending paragraphs was not caught by the terms of the injunction is by itself reflective that it was never the intention to write to the plaintiff's managing director in his personal capacity.

[22] The paragraphs in the letter of 29 March 2007 is a highly opinionated expression based on unfounded facts. There is to my mind no factual basis upon which the opinion was founded. The defendant's opinion that the court order dated 18 January 2007 has been set aside by the Court of Appeal is clearly incorrect as the defendant's appeal against the order has yet to be heard. Hence it is patently wrong for the defendant to conclude that the order has been superseded by an order of the Court of Appeal.

[23] Again the defendants reliance on the order of the Court of Appeal of 21 November 2006 to support its contention that the order of this Honorable Court on 18 January 2007 has been superseded is not only incorrect but tantamounts to misleading the

court. As correctly pointed out by learned counsel for the plaintiff the order of the Court of Appeal of 21 November 2006 was made in Civil Appeal No. J-02-192-2005. This appeal was against an order made by the High Court in Civil Suit No. MT1-22-458-2003 (Civil Suit 1). That suit was an action by the plaintiff for an order of specific performance against the defendant. The order sought was to compel the defendant to transfer 5 parcels of condominium to the plaintiff pursuant to the Joint Development Agreement dated 30 March 1992 between the parties.

[24] The defendant lost Civil Suit 1. The plaintiff succeeded in obtaining summary judgment for specific performance against the defendant in that action. The defendant then lodged an appeal against the decision. This is the appeal that the Court of Appeal heard and dismissed on 21 November 2006. There is thus no factual basis whatsoever for the defendant to reasonably entertain the notion that the order of this Honorable Court on 18 January 2007 has been superseded by an order of an appellate court.

[25] Again a careful analysis of the phraseology used in the offending paragraphs of the letter of 29 March 2007 it is patently clear that the defendant is writing this letter to Dato' Tan simply because the latter is the managing director in the plaintiff company. Had Dato' Tan not been connected to the plaintiff, the defendant would certainly not have written these letters. The tenor of the letter also demonstrates that the defendant was writing about matters involving the plaintiff and it can by no stretch of the imagination be taken as matters involving Dato' Tan in his personal capacity divorced from the plaintiff company. The defendant was clearly communicating with the plaintiff through the plaintiff's managing director.

[26] Though the contents of the offending paragraph of the letter dated 4 April 2007 is incoherent verbiage what is noteworthy is that it establishes that the defendant's intention was to communicate with the plaintiff through its managing director. What other explanation could there be since the defendant's expressed thoughts is that the addressee was the only person capable of saving the plaintiff from ruin? The addressee's ability to save or control the plaintiff, if any, could only emanate from the fact that he is the plaintiff's managing director. There is no evidence that the addressee as an individual in his personal capacity or as a qualified accountant, divorced from his position as the plaintiff's managing director, has such clout over the plaintiff, a public listed company.

[27] Upon evaluating the offending paragraphs in the several letters aforesaid it is my finding that the defendant's letters were written to Dato' Krishnan Tan in his capacity as the plaintiff's managing director. My finding is predicated by the usage of the words "your company" which is clear reference to the plaintiff and the contents thereof which revolved around the dispute between the plaintiff and the defendant on matters arising from the Joint Development Agreement (JDA) which clearly had nothing to do with the plaintiff's managing director in his personal capacity.

[28] Furthermore the affidavit evidence establishes that the plaintiff's managing director is not a personal acquaintance of the defendant. Not only has this been stated as a fact in the plaintiff's reply affidavit, it is also evident from the fact that the defendant wrote to him at the plaintiff's office address and did not send these letters to his residential address. This only goes to show that the defendant knows of Dato' Tan in his office of managing director of the plaintiff and does not know him as a personal acquaintance.

[29] As found by me and at the point of being repetitious the substance of the defendant's letters relate to matters in dispute between the plaintiff and defendant. It has nothing to do with the plaintiff's managing director in his personal capacity. Even if the letters were written to him in his capacity as a qualified accountant, he is not the plaintiff's accountant. What possible reason could there then be to write to him about matters involving both the plaintiff and defendant?

[30] The explanation that the defendant is a shareholder of the plaintiff is likewise without merit. I agree with the submission of learned plaintiff's counsel that being a shareholder does not afford any basis for the defendant to write to the plaintiff's managing director regarding the dispute between the plaintiff and defendant. It is trite that a shareholder only has a right to air his or her views at a general meeting of the company, and that right is only limited to matters affecting him or her in the capacity of a shareholder. In other words, a shareholder can only raise matters that concern his shares or that may affect his shares in the company. In the present case, the defendant is not writing about matters that affect its shareholding in the plaintiff. Instead, the defendant is writing about matters completely alien to its shares in

A the plaintiff. What the defendant has written about is personal and unique to it alone. These matters are relevant to the defendant only in its capacity as one of the parties to the Joint Development Agreement dated 30 March 1992 and not as the plaintiff's shareholder.

B

[31] Coming to the defendant's contention that the scope of the injunction only restrains the defendant from writing to the plaintiff and not the plaintiff's agent, officers or employees necessitates an evaluation of the scope of the injunction.

C

[32] Now, the terms of the injunction prohibits the defendant either by itself or by its employees or agents or any other person from contacting the plaintiff either through letters and/or whatever announcement and/or any publication regarding any matter related to the Joint Development Agreement dated 30 March 1992 that
D may constitute a nuisance on the plaintiff.

[33] The defendant's contention that the injunction only prohibits it from contacting the plaintiff and not the plaintiff's agents or employees cannot be countenanced.

E

[34] The plaintiff is a company. It is trite that a company, though a separate legal entity in law, is nevertheless an artificial entity. A company has no physical or mental existence and can do no act on its own motion but only through the agency of people. As a
F company has no physical or mental existence, the directors of the company, its other officers and employees represent it. Hence a company can only act through the agency of humans and this is the rationale for the law to hold the persons who direct a company responsible for the wrongdoings or the criminal acts of
G the company. As Viscount Haldane LC said in *Lennard's Carrying Company v. Asiatic Petroleum Co Ltd* [1915] AC 705.

> My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of
H somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction of the shareholders in general meeting; that person may be the board of directors itself, or it
I may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him

under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company.

[35] The courts approach to the doctrine of separate legal entity has always been pragmatic. Where the doctrine is used for improper purposes, for instance to justify a wrong, the courts will treat a company as an association of persons. In this regard, reference is made to *United States v. Milwaukee Refrigerator Transit Co.* 142 Fed 247 [1905] where Sanborn J said:

... A corporation will be looked upon as a legal entity as a general rule ... but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.

[36] Seen from this vantage point the defendant is obviously trying to rely on the separate legal entity of the plaintiff to defeat the injunction against it and to justify its wrongful breach of the injunction. Lest it be forgotten, the injunction is aimed at restraining the defendant from sending harassing letters which constitute a nuisance. The plaintiff, which has no physical or mental existence, is not capable of being harassed. But its agents that is to say its directors, officers and employees, who are the mind and will of the company, are certainly capable of being harassed.

[37] The letters sent in the past, which formed the basis for the grant of a permanent injunction, though addressed to the plaintiff, were not read by the plaintiff but its human agents, that is to say its directors, managers or employees. The only difference now is that the defendant has addressed its letters to the plaintiff's managing director, and in doing so has perpetuated the very nuisance that is prohibited.

[38] By arguing that the injunction only prohibits letters written (that is addressed) to the plaintiff but not its agents, officers and employees, the defendant invites this Honorable Court to draw a synthetic distinction that results in a technical or literal observance of the words of the order while violating the very spirit of the order. The court cannot in good conscience sanction such an approach as it will open the floodgates and recalcitrant offenders will have a field day drawing capricious distinctions to escape the limitations placed on them by an injunction.

[39] It is to be reiterated that a distinction must be made between an ambiguous order and an all-encompassing or comprehensive order. It is trite that an order of court must be clearly worded and its meaning unambiguous or unmistakable. This is more so in cases where failure to comply with the order will constitute a contempt of court, as in this case. This requirement has been reiterated time and again, and one need refer only to the House of Lords in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] 1 AC 130 for it.

[40] But an order of court that is precisely worded is not synonymous with an order of court that is comprehensively worded. The latter is simply not possible and it follows that there can be no such requirement in law. To better explain what is meant by this, there is a need to refer to the sage words of Denning LJ (as he then was) in relation to legislation and statutory interpretation in *Seafood Court Estates Ltd v. Asher* [1949] 2 KB 481, which can be regarded as a seminal exposition of the principles of general application in the sphere of interpretation of written instruments:

> **Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise,** and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention or Parliament ... (emphasis added)

[41] That part of the passage to which I have lent emphasis underscores the fact that no man can foresee all factual matrices when drafting an act of Parliament and hence as rightly submitted by learned counsel for the plaintiff it should be no different for a court order drawn up based on the pleadings prepared by a solicitor. Hence it goes without saying that court orders are

likewise not drawn up with divine prescience and perfect clarity. They are based on the remedies sought in the pleadings filed, which are likewise not drafted with divine prescience and perfect clarity. In illustrating the point learned counsel for the plaintiff points out that it was not humanly possible to foresee that the defendant would purchase the plaintiff's shares through the stock market and become a shareholder of the plaintiff. It was equally not humanly possible to foresee that the defendant would artfully attempt to sidestep the injunction and conceal its breach by relying on its new-found capacity as a shareholder of the plaintiff. The illustration of learned counsel for plaintiff in support of his argument to my mind, upon careful consideration has merits. The principles in Garden Cottage Foods Limited must be applied carefully lest artful contrivances are employed to evade court orders. As long as the aim of a court order is clear and unambiguous, all devices, ingenious or otherwise though not expressly referred to in the court order but are an obvious design to prevaricate the order will attract penalty for disobedience. It is my firm finding that the injunctive order herein is clear and unambiguous, its aim and purpose obvious. There is no merit in the defendant's contention that the order was ambiguous. The argument was purely a clever contraption to escape the letters of the injunction.

[42] That the defendant was employing devices to evade the injunction was also clear to its former solicitors who advised the defendant to desist from sending further letters. In their letter of 18 April 2007 to the defendant, the defendant's solicitors wrote:

> We would also like to advice *(sic)* you that you should refrain from corresponding with the Defendant's directly pursuant to the Injunction obtained *vide* suit No. 22-724-2005 (MT1) and your continuous *(sic)* action in doing so may tantamount to a contempt of court. (emphasis added)

[43] Now, learned counsel for the defendant has objected to the use of this letter on the ground that it was privileged communication between the defendant and its solicitors. In support, he referred the court to s. 126 of the Evidence Act 1950 and the case of *See Teow Chuan & Anor. v. Dato' Anthony See Teow Guan* [2006] 2 CLJ 292. I have read *See Teow Chuan & Anor* and I must say, with respect, that it does little to advance the defendant's position. On the contrary, the case supports the plaintiff's contention that privilege does not extend to the

A solicitors' letter in question because the defendant had waived privilege. But before I deal with the principles the Court of Appeal set out in *See Teow Chuan & Anor,* it is necessary to first explain how the letter came to be in the plaintiff's hand and why the plaintiff contends privilege was waived. The letter in question was
B exhibited in the affidavit of Jayaperakash a/l Jayadevan affirmed on 7 May 2007. He was the advocate acting for the defendant at that time. He filed the affidavit to support his law firm's application for an order that the firm be discharged from further conduct of the matter for the defendant. The affidavit in question was then
C read in court in support of the application and following this an order of discharge was granted.

[44] The letter came into the plaintiff's possession because it formed an exhibit in an affidavit filed in court, and that affidavit
D had been served on the plaintiff's solicitors by the defendant's solicitors. As the affidavit was filed in court and read together with its exhibits in court, the letter in question became a public document and the plaintiff was right to argue that the veil of privilege was lost. The defendant at this stage cannot seek to
E restore the cloak of privilege to the letter in question. In *See Teow Chuan & Anor*, Abdul Kadir Sulaiman JCA was dealing with whether a legal opinion exhibited in an affidavit filed and used in court could continue to be privileged thereafter. The learned judge in arriving at his decision quoted the following line from *Derby &*
F *Co Ltd and Ors v. Weldon and Ors (No. 10)* [1991] 2 All ER 908 which merits reproduction here:

> Where a party deployed material in court in an interlocutory application, privilege that could otherwise be claimed in relation to that and associated material would be treated as waived altogether,
G with the result that the party could not then assert privilege for the same material at the subsequent trial.

[45] Having referred to it, Abclul Kadir Sulaiman JCA then went on to conclude in *See Teow Chuan & Anor*:

H
> As the legal opinion was exhibited in the affidavit and deployed in court in the striking out application by the defendant and was also read out in open court by counsel for both parties, the privilege was clearly waived altogether.

I **[46]** Likewise in this case, the letter was exhibited in an affidavit filed and read in court. It was exhibited by the defendant's then solicitors who clearly have at the very least the ostensible authority to waive any privilege attaching to the letter. They made the letter

public and part of the court's record. It is obvious that the privilege had been waived. Having decided that the letter is admissible, the content of the letter speaks for itself. Even the defendant's former solicitors were of the view that the defendant's letters though addressed to Dato' Krishnan Tan were in fact directed at the plaintiff. The defendant was advised that its actions would tantamount to contempt but that did not dissuade the defendant. The defendant sent another fourteen letters to Dato' Krishnan Tan after receiving advice from its former solicitors not to do so. These letters were produced but were rightly not relied as additional grounds for contempt. To rely on them as additional grounds or as supplements to the grounds set out in the statement filed pursuant to O. 52 r. 2(2) of the Rules of the High Court 1980 is not permissible. This is settled law and reference need only be made to the judgment of KC Vohrah J (as he then was) in *Syarikat M. Mohamed v. Mahindapal Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16 for his legal principle. But relying on the letters as additional grounds and relying on them as evidence of the wilful and intentional nature of the defendant's conduct are worlds apart. I find there is no principle in law and certainly no good reason against the use of these additional letters as evidence of contumacy as long as the plaintiff does not seek a finding of guilt against the defendant in respect of these additional letters which do not form part of the plaintiff's statement under O. 52.

[47] For the reasons already given, I cannot but agree with the plaintiff's counsel submission that:

1. The injunction was drafted in clear and unambiguous terms;

2. The contention that the injunction does not prohibit the defendant from writing letters to the plaintiff's agents, officers or employees is clearly untenable since the plaintiff being an artificial legal entity is one and the same as its agents, officers or employees in this case.

[48] To recapitulate the position it is my finding and judgment that:

1. The contents of the letters the defendant has written, whether addressed to its former solicitors and copied to the plaintiff's managing director or written to the latter directly, only relate to matters in dispute between the plaintiff and defendant arising out of the Joint Development Agreement dated 30 March 1992. The defendant has not denied this.

2. When the defendant expressly states in its letters to the plaintiff's managing director that it is writing to him in his personal capacity, the defendant is merely attempting to circumvent the injunction using those words as a caveat.

3. It is not disputed that the defendant is not a personal acquaintance of the plaintiff's managing director. This negated any possibility that the letters were written to the plaintiff's managing director in his personal capacity. The contents of the letter also do not have anything to do with him in his personal capacity.

4. The letters were also not written to the plaintiff's managing director in his capacity as a qualified accountant because once again the contents of the letter have nothing to do with him in that capacity.

5. While it cannot be denied that the defendant may be a shareholder of the plaintiff, nothing in the letters sent to the plaintiff's managing director relate to the defendant's rights as a shareholder. For that matter, the content of the letters clearly have nothing to do with the defendant's position as a shareholder of the plaintiff.

6. The fact that all the letters the defendant wrote concerned matters in dispute between the plaintiff and defendant arising out of the Joint Development Agreement dated 30 March 1992 coupled with the fact that the letters were sent to the plaintiff's managing director and sent to the plaintiff's business address shows beyond doubt that the defendant intended to perpetuate its past nuisance against the plaintiff and did so by addressing its letters to the plaintiff's managing director instead of the plaintiff.

7. The scope of the injunction is clear. An injunction restraining the defendant from committing nuisance by communicating with the plaintiff by necessity includes communicating with any agent, officer or employee of the plaintiff given that the plaintiff is an artificial legal entity and any communication with the plaintiff before or after the injunction was granted could only be through the medium of the plaintiff's agents, officers or employees. The defendant was also duly advised of this by its former solicitors.

[49] From the factual matrix herein it is clear that we are dealing with a defendant that thinks of itself as being "clever" by using labels such as "personal capacity" to provide itself escape if it is hauled up for contempt. An insight into the defendant's thinking is clear in its letter dated 19 April 2007 copied to the defendant's former solicitors. In response to its former solicitors' advice the day before that the defendant's action "may tantamount to a contempt of court", the defendant confidently responds, "Please note that we have never corresponded with IJM Corporation Berhad (the defendant directly) Dato Tan Boon Seng is not the plaintiff or a defendant in the injunction obtained in suit MT1-22-724-2005". (emphasis added). Once again, from the part that has been highlighted the defendant lets out of the bag its intention – to communicate with the plaintiff through what it considered an "indirect" route, and this essentially is an expressed intention to circumvent the injunction.

[50] It is patently clear in light of the advice the defendant received from its former solicitors and the defendant's response to that advice that the defendant intended to nullify the very object of the injunction by resorting to crafty labels and hiding behind the very weak curtain of technicality. But clearly such a position cannot stand in view of the plain and precise wording of the injunction.

[51] The tenuous excuses the defendant offers to this Honorable Court to justify its conduct are an insult to the dignity of this court. I have no doubt in my mind that in writing the 10 impugned letters, the defendant has deliberately attempted to circumvent the injunction and perpetuate the very nuisance it had been prohibited from inflicting on the plaintiff.

[52] It is trite that the standard of proof for civil contempt is no different from that of criminal contempt. Contempt of court being an offence of a criminal nature requires proof beyond reasonable doubt, per Lord Denning MY in *Re Bramblevale Ltd* [1970] Ch 128.

[53] What does proof "beyond reasonable doubt" mean? The *locus classicus* is the passage from the judgment of Denning J (as he then was) in *Miller v. Minister of Pensions* [1947] 2 All ER 372 where he said:

A That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so
B strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[54] From the evidence adduced herein and my findings aforesaid
C the plaintiff has clearly discharged the onus of proof beyond reasonable doubt for the following reasons:

1. The injunction restrains the defendant from communicating with the plaintiff on matters relating to the Joint Development
D Agreement dated 30 March 1992 as the plaintiff had satisfied this Honorable Court that similar communications in the past from the defendant constituted a nuisance.

2. The scope of the injunction is unambiguous. The term "plaintiff" in the injunction naturally includes the plaintiff's
E agents, servants, officers or employees as the plaintiff is an artificial legal entity. The defendant is enjoined from communicating in writing or otherwise with the plaintiff's managing director.

F 3. The defendant was at all material times represented by solicitors. The defendant had access to legal advice if in doubt about the ambit of the injunction. In point of fact, the defendant had been advised by its former solicitors that the defendant's act in continuing to send letters to the plaintiff's
G managing director was tantamount to contempt of court.

4. It is not disputed that the defendant wrote or copied letters to the plaintiff's managing director. It is also not disputed that the content of these letters concern matters relating to the
H Joint Development Agreement dated 30 March 1992.

5. The caveat in the defendant's letters stating that it was written to the plaintiff's managing director in his "personal capacity" establishes that the defendant was attempting to circumvent the injunction. Otherwise, what need was there for
I such qualification to be included in each letter?

[55] For the foregoing reasons I have no hesitation in holding that the defendant is guilty of contempt of this Honorable Court.

[56] I shall now address the question of punishment for contempt.

[57] The Supreme Court in *Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427 held that an injunction must be obeyed until it is set aside. Wan Adnan FCJ (as he then was) in that case, in answer to the contention that the injunction was made without jurisdiction, said:

> In my view these points are not relevant in contempt of Court proceedings. They are relevant and may be valid in a proceeding to set aside the injunction. In the instant case the interim injunction order was made *ex parte*. Until and unless it is set aside the order is valid and must be obeyed. If the person against whom the order is made feels that the injunction order ought not to have been made for any reason he must apply to have it set aside. Until it is set aside he must respect and obey it.

[58] In *T.O. Thomas v. Asia Fishing Industry Pte Ltd* [1977] 1 LNS 126, Lee Hun Hoe CJ (Borneo) delivering the judgment of the Federal Court set out the test in matters contempt arising out of disobedience to an order of injunction as follows:

> In the matter of contempt arising out of disobedience to an order of injunction of court the test is to ask whether defendant knows of it.

[59] The law as stated in both Federal Court cases applied to this case means that the defendant is bound to obey the permanent injunction in the judgment dated 18 January 2007 until such time that it is set aside and the defendant is bound to obey so long as the defendant has knowledge of the injunction. Though the order of injunction is under appeal, it has not yet been set aside and hence must be obeyed. The defendant also has knowledge of the injunction in view of the fact that the defendant was represented by solicitors in this suit.

[60] On the sentence that ought to be meted out for the defendant's contempt of court, it is pertinent to emphasize that it is not incumbent upon the plaintiff to establish that the defendant intended to breach the injunction. *Mens rea* is not required for the offence of contempt of court. In this regard, reference is made to what Palles CB in *Rex v. Dolan* [1907] 2 IR 260 (which the Federal Court cited with approval in *T.O. Thomas v. Asia Fishing Industry Pte Ltd (supra)*.

A As to the law applicable to the case, there is no doubt. Actual intention to prejudice is immaterial. I wholly deny that the law of this court has been that absence of an actual intention to prejudice is to excuse the party from being adjudged guilty of contempt of court ... or that absence of intention is to excuse the party from punishment. Such a circumstance as that ought, no doubt to be taken into consideration in considering the nature of the punishment to be awarded, as, for instance, whether it should be imprisonment.

[61] When there is failure to comply with a court order, the C courts are cognizant of the fact that there are various degrees of non-compliance. In *Howitt Transport Ltd & Anor v. Transport and General Workers' Union National Industrial Relations Court* [1973] 1 CR 1, Sir John Donaldson explained the various degrees of defiance or non-compliance of a court order.

D Non-compliance with a court order can have a wide range of qualities. It may, at the top end of the scale, consist of a flat defiance of the court's authority. Going down the scale, it may not amount to flat defiance, but rather to a passive ignoring of the court's order. Going down the scale still further, it may E amount to a half-hearted or, perhaps, colorable attempt to comply with the court's order. And, at the bottom end of the scale, there may have been a genuine, whole-hearted use of the best endeavours to comply with the order, which nevertheless has been unsuccessful. In each case there is a breach of the court's order. In each case, to use the technicalities of the law there is a F "contempt of court". But the quality of the non-compliance varies over an enormous range. The penalties which will be imposed by this court for contempt will equally vary over an enormous range and will reflect the quality of the non-compliance. They will, in fact, reflect faithfully the court's view of the seriousness of the G conduct of the person to whom the order was addressed.

[62] As my findings established this is a case of downright defiance of the injunction arising from the defendant's obvious and deliberate attempt to circumvent the injunction mentioned as H detailed in the foregoing paragraphs. It is also inescapable that notwithstanding the advice of their solicitors that their action tantamounts to contempt of court the defendant persistently pursued their contemptuous conduct by sending an additional 14 letters after being advised by its solicitors not to do so.

I

[63] Though the plaintiff does not rely on these subsequent breaches of the injunction in the application herein nevertheless it illustrates the defendant's defiant stance and its wilful breach of the injunction despite being advised by its solicitors to desist.

[64] The punishment for contempt of court could either be imprisonment, a fine or a severe reprimand. The punishment must be commensurate with the nature of the breach or in other words the degree of culpability. A breach that can be classified as open defiance of the court's authority, as Sir John Donaldson pointed out in *Howitt Transport*'s case, must attract greater penalty as opposed to a contemnor who genuinely unconditionally tried to comply with the order, though was unsuccessful.

[65] Based on the circumstances, I cannot but conclude that this is a case of open defiance on the defendant's part. The defendant has not shown any remorse and has not offered any apology for its conduct. This only goes to prove that the defendant is both obstinate and intractable despite the weight of the overwhelming evidence against it.

[66] Turning to the evidence herein there appears to be no evidence to demonstrate that the defendant is contrite and sorry for its flagrant breach of the injunction. Hence in the light of the defendant's conduct and the gravity of the breach, it is only proper that a custodial sentence be imposed. In *Anthony Ratos s/o Domingos Ratos v. City Specialist Centre Sdn Bhd (t/a City Medical Centre) (Attorney General, Intervener)* [1996] 3 CLJ 415 where KL Rekhraj JC (as he then was) said:

> This court repeats that for the future, where the contempt is grave – as in this case – no fine will do, as the haughty and well to do contemnors will scornfully throw their money in the face of the court and get away without the least degree of remorsefulness and compunction. Let the contemnors be warned that imprisonment shall be the order of the day. The courts will no longer be moved by mitigating circumstances.

[67] Though in *Anthony Ratos (supra)* the court said that the mitigating circumstances will no longer persuade the court to show leniency the factual matrix herein shows an absence of any evidence of apology and repentance by the defendant which warrants me to conclude that "imprisonment shall be the order of the day".

[68] Since the defendant herein is body corporate the penalty of the custodial sentence has to be borne by the directors.

[69] The defendant herein has two directors, namely Yai Yen Hon @ Chua Yen Hon and Wong Quai Yin. The former has filed an affidavit admitting that he wrote the infringing letters on the defendant's behalf. The latter has not filed any affidavit. In his affidavit, Yai Yen Hon has also sought to absolve his fellow director for the defendant's contempt. To my mind the former cannot absolve the latter. Each director, whether actively managing the day-to-day affairs of the company or not, is under an obligation to ensure that the company in which he or she is a director complies with any court order affecting the company. The Privy Council in *Datuk Hong Kim Sui v. Tiu Shi Kian & Anor* [1978] 1 MLJ 345 after referring to O. 45 r. 5(1)(b)(ii), r. 7(3)(a) and 4(b) of the Rules of the High Court 1980 held:

> Thus the Rules recognize that directors and officers are the human agencies responsible for the conduct of the affairs of companies. They fix a director with liability for the conduct of the company and so with liability for any breach by the company of an injunction where the director has appropriate notice that he is liable to process of execution if the company disobeys the order.

[70] In *William Jacks & Co (M) Sdn Bhd v. Chemquip (M) Sdn Bhd & Anor* [1994] 3 CLJ 125, Abu Mansor J (as he then was), in relation to the argument that an inactive director ought not be held liable for breach of an injunction, said:

> Leong's, Lee's and Lim's defence was they played only passives role in the first defendant, leaving the day-to-day running of the company to the second defendant. They alleged they could not be committed for contempt. I find merit in the applicant's counsel's argument that directors of a company who have been notified of an injunction are liable for the breach of the injunction by the company and it is no defence if they claim they were only 'sleeping directors'.

[71] The injunction in this case was served on the defendant at its registered address. There is no allegation in the affidavits filed on behalf of the defendant's directors that Wong Quai Yin was unaware of the injunction or had not been notified of it. In the absence of such an allegation, it must be taken that she was duly notified of the injunction and was fully aware of it.

[72] So long as Wong Quai Yin was aware of the injunction and held the office of a director, a duty is reposed in her to ensure that the defendant complied with the injunction. The Court of Appeal of Hong Kong in *Nicolas Pappadis v. Chan Shing Sheung Barry* [1989] 2 HKLR 511 reiterated this distinct duty of a director of a company under O. 45 and the liability that can attach if a director failed to ensure his company complied with a court order. Hunter JA in that case said:

> The second basis upon which a director can be committed for contempt is under this overall description of aiding and abetting as this Court held in the case of *Cartier International B.V. and Others v. Kaybee International Ltd* [1985] HKLR 127. There is a very big difference between these two approaches. *Under Order 45 no moral blame or necessarily knowledge, need be shown in the director. It is sufficient to show that the order was made against the company and served upon him. Then it is the director's personal obligation to ensure that that order is complied with.* When you are dealing with aiding and abetting the situation is quite different. What has to be shown is personal misconduct on the part of the director. (emphasis added)

[73] The case in question is *Director General of Fair Trading v. Buckland* [1990] 1 All ER 545 where Anthony Lincoln J made a statement that could lead to the conclusion that liability of a director under O. 45 r. 5 could only exist if the director were otherwise liable under the general law of contempt. Regarding this judgment, and in particular that part, Woolf LJ in *Attorney General for Tuvalu v. Philatelic Distribution Corp Ltd* [1990] 1 WLR 926 pointed out that the facts in the *Buckland* case were somewhat peculiar and said:

> That remark was however made in a case where there was no finding made against the director of culpable conduct and it should not be taken as meaning that it is only where a director has actively participated in the breach of an order or undertaking that Ord. 45, r. 5 can apply. If there has been a failure to supervise or investigate or wilful blindness on the part of a director of a company his conduct can be regarded as being wilful and Ord. 45, r. 5 can apply.

[74] Woolf LJ then referred to the judgment of Megaw J in *Re Galvanized Tank Manufacturers' Association's Agreement* [1965] 1 WLR 1074 as the correct statement of law in this area. In the *Galvanized Tank* case, Megaw J said in relation to a breach of undertakings given to the court *in lieu* of the issue of injunctions:

> We would, however, emphasize that a company which has given an undertaking to the court must be treated as having failed lamentably and inexcusably in its elementary duty if it fails to take adequate and continuing steps to ensure, through its responsible officers, that those officers themselves, and anyone to whom they may delegate the handling of matters which fall within the scope of the undertaking, do not forget or misunderstand or overlook the obligations imposed by such undertakings. In view of what has emerged in the present case it may be that other companies which have given similar undertakings would be well advised to review the position so far as they are concerned, to ensure that they are not failing in the same way in a matter of such gravity from the point of view of the public and of the company itself.

[75] Both cases William Jacks and Nicolas Pappadis settle the principle that a director with knowledge of a court order against the company is duty bound to ensure the company's compliance with the order. If the company fails to do so, it is no answer to a charge for contempt that the director did not participate in the management of the company's affairs. In the best tradition of the Bar, learned counsel for the plaintiff brought to the court's attention a different approach taken by an English court though that case went against his argument that Wong Quai Yin ought also to be punished for the defendant's contempt.

[76] Having considered all the authorities on this point it is my judgment that Wong Quai Yin has an obligation to take adequate steps to ensure the injunction is obeyed and in this regard I associate myself with the judgment of Woolf LJ in *Attorney General for Tuvalu v. Philatelic Distribution Corp. Ltd. (supra)*. There is nothing in the affidavit filed on her behalf to demonstrate that she took such steps. If she delegated that responsibility to her fellow director, she regardless remains liable as she failed to ensure the defendant obeyed the injunction. Though Wong Quai Yin was not the author of the infringing letters and may not have had knowledge of her fellow director's action done in breach of the injunction, Wong Quai Yin is nevertheless also guilty of contempt of court. But as she had no complicity with her fellow director's actions, a custodial sentence may be unduly harsh and a stiff fine should impress upon Wong Quai Yin that the orders of this Honorable Court must be obeyed.

[77] For the reasons given, the plaintiff's motion in encl. 62 is hereby allowed and the defendant is found guilty of contempt. I accordingly order that the defendant's Director Yai Yen Hon @

Chua Yen Hon who authored and sent the letters to the plaintiff's Managing Directors in breach of the injunction do stand committed to prison to be there imprisoned for a period of 14 days for the contempt of court and Wong Quai Yen be fined in the sum of RM20,000 to be paid for forthwith and in default thereof to a term of imprisonment of 14 days for the contempt committed by the defendant. The defendant and its two directors aforesaid are also ordered to pay the plaintiff the cost of this motion to be taxed.